

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID DAY,

Plaintiff-Appellant,

V

GRAYBAR ELECTRIC COMPANY, INC.,

Defendant-Appellee.

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UNPUBLISHED

May 16, 2006

No. 265696

Wayne Circuit Court

LC No. 04-421814-NI

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

In this age discrimination case, plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor. We affirm.

I. Facts

Plaintiff began his employment with defendant in 1970, eventually working his way up, through a series of promotions, to a position of assistant district operating manager. After brief employment with another company, plaintiff returned to defendant renewing his "climb up the corporate ladder." Ultimately, plaintiff applied, and was chosen for, the position of manager of customer service at defendant's Livonia branch. In 1999, plaintiff transferred to Auburn Hills, which was closer to his family's home in Rochester. Plaintiff undisputedly received satisfactory performance ratings in this position.

In 2001, plaintiff suffered an aortic tear that required emergency surgery. Plaintiff missed approximately four months' work as a result. After his recovery, plaintiff returned to work meeting expectations. Six months later, when plaintiff was fifty-six years old, defendant announced that plaintiff's job would be eliminated in corporate restructuring necessitated by a drop in revenues and operating income at the Auburn Hills branch. Defendant replaced plaintiff's position with the position of area manager of customer service operating out of defendant's Belleville branch. For the consolidated position, defendant hired another employee who was 38 years old and whose performance reviews were not as good as plaintiff's.

Although defendant eliminated plaintiff's position, plaintiff's supervisors gave him the opportunity to propose an alternative position that he would be interested in taking. Plaintiff, however, declined to make a proposal. Instead, he asked his superiors to make an offer they saw fit. Defendant offered plaintiff the position of supervisor of customer service in the Belleville

branch, a position of diminished responsibility, decreased salary, and increased commute. Plaintiff declined the position and requested a position at the Auburn Hills facility. Defendant denied this request. Plaintiff consequently felt that he had no choice but to retire, which he did in January 2003.

In May 2003, after determining that the new working arrangement was not effective, defendant re-established the manager of customer service position in Auburn Hills. The opening was posted accordingly. Plaintiff was aware of the availability of this position, but did not apply. The position was given to a younger female employee who applied for the position.

Plaintiff subsequently filed a complaint alleging that he was constructively discharged on the basis of his age when defendant eliminated his position and offered him a demoted position with less pay and a longer commute. Defendant filed a motion for summary disposition arguing that plaintiff failed to present any evidence that he suffered an adverse employment action. The trial court granted defendant's motion.

## II. Analysis

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Plaintiff argues that he set forth sufficient indirect evidence of age discrimination under the burden-shifting approach in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). To establish a rebuttable prima facie case of discrimination under the *McDonnell Douglas* approach, a plaintiff must present evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). When a plaintiff establishes a prima facie case, a presumption of discrimination arises. *Id.*

Plaintiff alleged that the adverse employment action he suffered was a constructive discharge. It is well recognized that “a constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign.” *Jacobson v Parada Fed Credit Union*, 457 Mich 318, 325-328; 577 NW2d 881 (1998), quoting *Champion v Nationwide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). “A finding of constructive discharge depends on the facts of each case.” *Wolff v Automobile Club of Mich*, 194 Mich App 6, 15; 486 NW2d 75 (1992).

In this case, defendant eliminated plaintiff's position in the course of corporate restructuring. Nonetheless, plaintiff's supervisors gave him the opportunity to propose another position that he would like to take. Plaintiff refused to make a proposal, but instead suggested that his supervisors make an offer they saw fit. At no time did any agent of defendant suggest or

imply that plaintiff should retire. Rather, defendant offered plaintiff a position of slightly diminished status and a salary reduction of approximately \$10,000. The new position also would have required plaintiff to commute approximately 50 miles in one direction, an increase from his former location. While this certainly represents a change for the worse, viewed objectively, it does not rise to the level of being “so severe that a reasonable person in the employee's place would feel compelled to resign.” *Jacobsen, supra* at 325-328, quoting *Champion, supra* at 710. On the contrary, plaintiff, who subjectively found the circumstances less than satisfactory, voluntarily chose to retire. Moreover, when defendant later reinstated plaintiff's position, plaintiff, who knew of the opening, did not apply. On this record, we conclude that plaintiff failed to present any evidence of constructive discharge. Because plaintiff failed to present any evidence supporting his claim, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Brian K. Zahra